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IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Henry W. Crumrine et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

Roy W. Canaga et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

Memorandum of Argument of Defendant in Error.

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United States Attorney.
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Memorandum of Argument of Defendant in Error.

The opening brief of appellant quoted section 9 of the act of August 10, 1917—the "Lever Act"—as applicable to the case at bar. (Opening Brief p. 6.)

We followed in their wake and presented the case as though that section was in effect. Appellants' Reply Brief claims a reversal because section 9 of that act was repealed by section 3 of the amendatory act passed October 22, 1919—41 Stat. L. p. 297. But this oversight on the part of counsel cannot avail appellants.

It is true that appellee's brief refers to section 9 and claims certain advantages to the appellee because of the separation of the offenses that arise from the provisions in relation to the same being in different sections. (See Brief pp. 6 and 12.) But nevertheless, the argument of appellants is fully met by reason and authority, notwithstanding the erroneous injection of the repealed section 9.

The indictment itself states an offense under section 4 as amended. (See Br. p. 12.)

It was held in Williams v. U. S., 168 U. S. 382, 389, that:

> "We must look to the indictment itself, and if "it properly charges an offense under the laws of "the United States, that is sufficient to sustain it, "although the representative of the United States "may have supposed that the offense charged was "covered by a different statute."

See:

U. S. v. Nixon, 235 U. S. 231, 234 *et seq.;*

Vedin v. U. S., 257 Fed. 550, 551, 250 U. S. 663.

As a matter of fact the transcript shows that the indictment was for

"Viol.: Act of August 10, 1917, as amended Oct. 22, 1919,—Lever Act."

See:

Tr. p. 7, certified copy of indictment;

Tr. pp. 42, 45, 47, 50 and 53, bonds of appellants.

There was no misunderstanding at the trial and appellants were indicted and tried under section 4 of the act as amended. We hereby withdraw the statements in our answering brief which assume the prosecution was under section 9 of the original act.

Section 22 of the act of August 10, 1917, reads as follows:

> "If any clause, sentence, paragraph, or part of "this act shall for any reason be adjudged by any "court of competent jurisdiction to be invalid, "such judgment shall not affect, impair, or invali-"date the remainder thereof, but shall be confined "in its operation to the clause, sentence, paragraph "or part thereof, directly involved in the contro-"versy in which such judgment shall have been "rendered."

Under this provision the portion of section 4 held unconstitutional in the Cohen and Weeds decisions of the Supreme Court is distinct and separate from the portion thereof involved in the case at bar, and the holding in those cases does not, therefore, control.

Berea College v. Kentucky, 211 U. S. 45, 55;
6 R. C. L., Sec. 121, p. 121;
Constitution of California, Treadwell, 4th ed., XIII.

II.

We desire to cite as additional authority as to the inapplicability of the "equal protection of the laws"

clause of the Fourteenth Amendment, page 14 of our brief, as follows:

U. S. v. Sugar, 243 Fed. 423, 429;

Flint v. Stone Tracey Co., 220 U. S. 107, 159-160;

Lindsley v. Nat. Carbonic Gas Co., 220 U. S. 61, 78;

Johnston v. Kennecott Copper Co., 248 Fed. 407, 413.

III.

Appellants quote Adair v. United States, 208 U. S. 161, in Opening Brief (p. 12) to justify strike. But this very quotation modifies by use of the words

"—at least, in the absence of contract between the parties—."

The indictment charges that appellants unlawfully conspired to limit the facilities for transporting necessaries by means of agitating, calling and declaring a strike. The testimony at the trial showed that the Railroad Companies had contracts with the Railroad Brotherhoods to furnish the men to carry on the switching, and not to strike or leave the employment without first giving thirty days' notice of their intention so to do. The appellants were members of these Brotherhoods and by their conduct they breached the contract of their employment, for they left the service and agitated the strike which resulted in the tie-up of interstate commerce without any notice whatever to the Railroad Companies.

IV.

The indictment at bar surely sets out "the nature "and cause of the accusation," and it is sufficient "with "clearness and all necessary certainty to apprise the "accused of the crime with which he stands charged." The offense is stated with great particularity. There can be no doubt as to the matters intended to be charged and the meaning of the words of the indictment.

A comparison of that portion of section 4 of the Lever Act held to be invalid with the portion under consideration in this case, and an examination of the decision in United States v. Cohen Grocery Co., will demonstrate that the latter case is not analogous to the case at bar. The section in its entirety, as amended, with the portion applicable to the case at bar capitalized and the portion held invalid in the Cohen and Weeds cases italicized, is as follows:

> "IT IS HEREBY MADE UNLAWFUL FOR ANY PER-"SON wilfully to destroy any necessaries for the "purpose of enhancing the price or restricting the "supply thereof; knowingly to commit waste or "WILFULLY TO PERMIT PREVENTABLE DETERIORA-"TION OF ANY NECESSARIES IN OR IN CONNECTION "WITH THEIR production, manufacture, or DIS-"TRIBUTION; to hoard, as defined in section 6 of "this Act, any necessaries; to monopolize or at-"tempt to monopolize, either locally or generally, "any necessaries; to engage in any discriminatory "and unfair, or any deceptive or wasteful practice "or device, or *to make any unjust or unreasonable*

"*rate or charge in handling or dealing in or with*
"*any necessaries;* TO CONSPIRE, COMBINE, AGREE,
"OR ARRANGE WITH ANY OTHER PERSON, (A) TO
"LIMIT THE FACILITIES FOR TRANSPORTING, pro-
"ducing, harvesting, manufacturing, SUPPLYING,
"STORING, or dealing in any necessaries; (b) to
"restrict the supply of any necessaries; (c) TO
"RESTRICT DISTRIBUTION OF ANY NECESSARIES;
"(d) to prevent, limit, or lessen the manufacture
"or production of any necessaries in order to
"enhance the price thereof; or (*e*) *to exact exces-*
"*sive prices for any necessaries,* or to aid or abet
"the doing of any act made unlawful by this sec-
"tion. Any person violating any of the provisions
"of this section upon conviction thereof shall be
"fined not exceeding $5000 or be imprisoned for
"not more than two years, or both: Provided,
"That this section shall not apply to any farmer,
"gardener, horticulturist, vineyardist, planter,
"ranchman, dairyman, stockman, or other agri-
"culturist, with respect to the farm products pro-
"duced or raised upon land owned, leased, or cul-
"tivated by him: Provided further, That nothing
"in this Act shall be construed to forbid or make
"unlawful collective bargaining by any co-opera-
"tive association or other association of farmers,
"dairymen, gardeners, or other producers of farm
"products with respect to the farm products pro-
"duced or raised by its members upon land owned,
"leased, or cultivated by them."

The entire reasoning of the court in the Cohen and Weeds cases is based upon the uncertainty of the stand-

ard provided by the words "unjust or unreasonable rate or charge" and "excessive prices."

No such uncertainty attaches to the words "to limit "the facilities for transporting, * * * supplying, stor-"ing * * *." These words are of a certain and ascertainable meaning. To limit means to restrain, to set bounds to. Hence the reason of the rule in the Cohen case excludes the charge in the case at bar; and as the only reason assigned for holding invalid the words involved in the Cohen case are their uncertainty, while the words of the statute in the case at bar are definite and certain to a common intent, it necessarily and logically follows that the portion of the section here involved must be upheld.

Respectfully submitted,

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